United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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Pgs

United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

-against-

BENJAMIN SCHWARTZBERG,

Defendant-Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

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Appellant's Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BENJAMIN SCHWARTZBERG,

Appellant.

QUESTIONS PRESENTED

1. Whether the defendant was deprived of a fair trial by reason of the prosecutor's improper argument and conduct.

2. Whether the evidence proved the elements of the crime charged, 18 U.S.C. Section 1951; and whether the criminal activity involved in this case is within the contemplation of the offense charged.

PRELIMINARY STATEMENT

Benjamin Schwartzberg appeals from a judgment of the United States District Court for the Eastern District of New York, rendered January 18, 1974, convicting him after a jury

trial (Weinstein, J.) of violating 18 U.S.C. §1951 (The Hobbs Act), and sentencing him to serve six months of a 10-year sentence, placing him on probation for 5 years, and fining him $10,008.

The defendant is currently at liberty pending appeal, after having served approximately 23 days of the prison sentence.

INTRODUCTION

In January, 1970, five principals (Philip Reicher, Irving Teitler, Charles Naer, Steven Levy, and Eugene Steinberg) started a wholesale-retail bagel business, the 21-44 Food Corporation. The store and bakery was located at 21-44 Utopia Parkway, Queens, New York, and was known as The Bagel Stop.

On July 28, 1970 the corporation ceased doing business. Before that, on July 17, the defendant, Benjamin Schwartzberg, was arrested after he allegedly attempted to set fire to the firm's delivery van. Mr. Schwartzberg was a competitor of 21-44 Food Corporation, and was eventually charged and convicted with violation of the Hobbs Act, 18 U.S.C. Section 1951.

FACTS

The Government's Case

1. The events leading up to the arrest of the appellant.

From January until June of 1970, Patricia Guze, then an eighteen year-old girl, worked as a cashier and sales girl at a

bagel bakery and store called the "Bagel Stop" located at 21-44 Utopia Parkway, Queens New York (Guze: 68-70, 94).* On July 17, 1970, approximately one month after she had stopped working there, Miss Guze went to the bakery intending to spend the night alone in the store (Guze: 69-70, 94). She testified that because of an argument with her parents she was not willing to sleep at home, and consequently wanted to sleep in the back of the store on a cot (Guze: 70, 96, 101). Miss Guze arrived at the store at approximately 6:00 P.M. and spent a few hours talking with two friends who were employees of the Bagel Stop, Diane Regan and Darryl Steinberg (Guze: 70). After getting permission for her to spend the night in the store, Darryl Steinberg, the last employee to leave, locked her in sometime between 11:45 P.M. and 12:30 A.M. (Guze: 73, 102, 103: Darryl Steinberg: 457).

At approximately 12:30 A.M., before going to sleep, Miss Guze testified that she decided to look out of the front window (Guze: 73). A grey Cadillac allegedly was pulling up near the store just then and a man wearing a white baker's uniform got out of the car (Guze: 74-75). After looking at the front of the bakery and walking up and down the block for five minutes he got back into the car and drove away (Guze: 74-76). Thereafter, she testified, the man returned and did the same thing on the other side of the street. All told, she said that the car passed the store approximately five times (Guze: 76-80).

At approximately 1:00 A.M., Diane Regan called the store and the two girls talked (Guze: 81-84: Regan 163, 169). Miss Regan, who lived "right up the street" from the store, testified

*Unless indicated otherwise, all references are to pages of the trial minutes.

that as she talked with Miss Guze she saw a grey Cadillac pass by on Utopia Parkway two or three times (Guze: 8-2: Regan 165). While the two girls were still talking on the phone, Pat Guze testified that she saw the Cadillac pull up behind the Bagel Stop's delivery truck which had been parked in front of the bakery. She looked away and when she looked outside again she purportedly saw the man squatting near the back of the truck, doing something with his hands "in the area of the gas tank" (Guze: 84-85). The man got back into his car and drove away as "flames (were) shooting out of the back of the truck" (Guze: 85). She hung up the telephone, called the police, and stayed in the back of the store. (Guze: 85-86).

When the police arrived Miss Guze went to the front window and spoke to Patrolman James Ward through a hole in the window (Guze: 86). At first the police did not know what was going on, she testified, but Miss Guze allegedly pointed to the back of the truck and told them of the fire in the gas tank (Guze: 86-87). At that point they went over to the truck and extinguished the flames (Guze: 86-87, 105-08).

Patrolman Ward described the incident somewhat differently. He said that he first arrived at the Bagel Stop shortly after 1:00 A.M. in response to a "radio run, of a 1059 truck on fire". When he arrived he saw no flames, but after making a U-turn and pulling his car directly behind the bakery truck he noticed some flames and extinguished them (Ward: 115, 138-40). It was only after he put the fire out, the patrolman said, that he spoke to Miss Guze through the broken store window (Ward: 115, 142-42).

According to Miss Guze's testimony, after the police extinguished the flames, and as she was telling them what

happened, she saw the Cadillac riding on Utopia Parkway. She pointed it out to the police who pursued and returned with the defendant about five minutes later. She then identified the appellant at the scene (Guze: 87-88).

According to Patrolman Ward's testimony, after extinguishing the flames he stayed in the area for approximately 45 minutes. During that time he spoke to Miss Guze and then resumed patrol (Ward: 118-19). As he did so, the patrolman saw a vehicle resembling the description given him by Miss Guze. He caught up to it and asked the driver, who turned out to be the appellant, to pull over. After questioning him, he brought the defendant back to the bakery where Miss Guze identified him, and where he was placed under arrest (Ward: 118-20).

2. The Bagel Stop goes out of business.

Philip Reicher, one of the five owners of the Bagel Stop, known formally as the 21-44 Food Corporation, testified that he had known the defendant for seventeen years and had, at one time, been employed by Mr. Schwartzberg (Reicher: 184-86, 187). In January of 1970, Reicher, together with four other partners, started the bagel business at 21-44 Utopia Parkway (Reicher: 188). He believed that it was the largest bakery of its kind, and its truck had a sign to that effect. The Bagel Stop baked only bagels and purchased bialys from Mr. Schwartzberg until approximately July 1, 1970, when it stopped doing business with the appellant (Reicher: 197). In his direct testimony, Mr. Reicher attributed the cessation of his business relationship with appellant to defective merchandise allegedly delivered by Mr. Schwartzberg (Reicher: 197). On cross-examination however, he admitted, after being confronted with his prior grand jury

testimony, that it was because he had taken business from appellant and had arranged to give all of his wholesale business to Martin Schwartzberg, appellant's nephew (Reicher: 302-04). His business relationship with Martin soon came to an end, however, and Reicher testified that he could not locate a bialy baker who would sell to him (Reicher: 201, 301, 311-14). Accordingly, the Bagel Stop started baking its own bialys which led to difficulty in filling its production quotas for bagels (Reichter: 200, 300).

Early in July, Reicher testified, he obtained ten Waldbaum Supermarket accounts from Morris Pitt, a vice-president of Waldbaum's. Five of the stores were in Nassau County and five were in Queens County. The five in Queens County had previously been serviced by the appellant, Benjamin Schwartzberg (Reicher: 198-99), and the rest of the Waldbaum accounts were taken from others (Reicher: 334). Shortly thereafter, on July 28, 1970, the 21-44 Food Corporation ceased doing business (Reicher: 238). Business had admittedly been slow. The corporation was not paying its bills; the company was in the "red" (Reicher: 250, 265) — its checks had been returned for insufficient funds (Reicher: 255-57, 268, 270-71). Reicher was taken to criminal court in connection with them (268-70); and suppliers stopped granting any credit and put the company on a C.O.D. basis (Reicher: 267). By the end of July the business owed over five thousand dollars to one company, over seventeen thousand dollars to another, and thirteen hundred dollars to a third; all in addition to being behind on payments for machinery, owing for outstanding salaries and owing for back payments on the truck (Reicher: 276, 282, 291, 296, 297, 313, 316).

After the Bagel Stop went out of business Mr. Pitt called Mr.

Schwartzberg and told him to resume servicing the Queens accounts previously taken from him (Pitt: 368). Reicher had called Pitt and told him that his truck had been demolished or "burnt down" and that he had financial difficulties and was going out of business (Reicher: 372, 374). Actually the damage to the truck cost $79, tax included, to repair (Reicher: 270).

Mr. Reicher testified to only one specific occasion when he saw and spoke to the appellant, Benjamin Schwartzberg. That occurred on July 10, 1970, shortly after he had been given the Waldbaum's accounts from Mr. Pitt. Mr. Schwartzberg had come in to collect on a check that had been given in payment for a long over-due bill, but which had been returned for non-sufficient funds (Reicher: 225, 255-56, 355-56). Reicher talked about his taking of the Waldbaum's account. Stephan and he apologized, adding that "business was business." Mr. Schwartzberg said nothing in reply except, "This is your last gasp, kid." (Reicher: 220).

There was also testimony that on several occasions Mr. Schwartzberg talked with Stephan Sterman, the Bagel Stop's 23 year-old delivery truck driver. Mr. Schwartzberg, a union member himself, tried to talk Sterman into joining a union (Sterman: 391, 393-95, 404). Substantially all of the other evidence related to the defendant's reputation and to the complainant's state of mind.

3. The reputation and state of mind testimony.

Philip Reicher, the unsuccessful bagel entrepeneur, was the first witness to testify concerning what was allegedly the defendant's reputation, and on his — Reicher's — state of mind

in July, 1970. First he said that Steve Saperstein, a friend of his, called him in early July 1970, and told hih to "watch" his equipment, especially the truck because it may be "bombed" by appellant (213-14). There was nothing in the record to connect Saperstein with the appellant or to substantiate that there was any basis for Saperstein's statement. It was admitted solely to show Reicher's state of mind. Saperstein also allegedly told Reicher that Schwartzberg "would do it to our personal cars also; to lock up the hoods and put locks on the gas caps also" (215). Mr. Saperstein was not called as a witness. Reicher also testified that he had been advised that appellant was an "extremely violent man" and that if accounts were taken from him by a competitor "in one way or another he would get the account back" (223) and that appellant was known as "Benny the bomber" and "Benny the torch." The sources of that information were Eugene Steinberg, Reicher's partner; Darryl Steinberg, Eugene's son and Reicher's employee; Norman Steinberg; Martin Schwartzberg; and Reicher's father (223).

On the issue of state of mind only, Reicher was allowed to testify, over defense objection, that on July 9 when he opened his store a window was broken and that the damage amounted to two hundred dollars (225-26); that on July 10 a rock was thrown through a door by an unknown person (227), and that after July 17, the date of defendant's arrest, he received four phone calls from an unidentified person (237-38). He was also permitted to testify concerning his state of mind and of occurrences that took place after July 17, 1970, the date of defendant's arrest (237-39). The witness also testified and emphasized that he was "frightened for (his) life", that he was "nervous and afraid" (231, 232, 236, 237), and that Darryl Steinberg was "afraid for himself" and "afraid of bodily harm" (231-32).

Darryl Steinberg, the son of one of Reicher's partners, was also permitted to testify about appellant's reputation, and the state of mind of those connected with the 21-44 Company. Steinberg testified that he had been told "not to take accounts away from Benny Schwartzberg, that if he did he or his father might "get hurt" (427); and that he knew the defendant's allegedly violent reputation (428).

The Defendant's Case

The defendant called four witnesses: Steven Levy, one of Reicher's partners in the defunct 21-44 Corporation; Barney Gadman, the national manager of Thompson Bagel Machine Manufacturing Corporation with offices in New York and California (547), Ted Schwartzberg, appellant's son, Jacob Schurmak, the vice-president of a leading flour supplier.

Levy testified that he knew the defendant and except for what he had heard from Mr. Reicher, he had never heard of Benjamin Schwartzberg referred to as being vicious, or as a "bomber" (492, 537-9, 543, 545). He also testified that the 21-44 Corporation was in serious financial difficulties by May, 1970 (494); that there were no discussions about going out of business because of the defendant (502); that Reicher never said that they had been threatened (507); that none of the partners ever said that they were afraid of appellant (502); and that neither Philip Reicher nor Darryl Steinberg ever said that they were afraid of appellant (507-08).

Barney Gadman testified that he had been doing business with appellant for five years (548), that he knew everyone in the bagel industry (548) and that he never heard the defendant referred to as "Bennie the bomber", or as vicious or dangerous (548). He

also testified that part of his duties were to pass on credit and financing for bagel manufacturers; that before 21-44 Food Corporation incorporated, he met with Philip Reicher, Eugene Steinberg and some others (548-9); that they discussed their planned business venture and were seeking equipment and technical "knowhow" from Mr. Gadman's company in order to assist them in establishing their business (550); that he (Gadman) inquired into their financial "set-up" and checked into their "background and business record" (551-2); and that it was his judgment that they were not in the position to take on the venture they were planning. If there was any prospective chance for success, it was slim (552-3).

Jacob Schurmack, the vice-president of Standard Milling Company, a supplier of 21-44 Food Corporation, testified that he had dealt with appellant for approximately twenty years, and that he sold flour to approximately 90% of the people in the bagel industry (567-8). He never heard of the defendant referred to as "Benny the bomber" or as vicious or dangerous (568).

He also testified that in 1970 he put 21-44 Food Corporation on a "C.O.D. Basis", that their checks bounced; and that as of the date of his testimony they still owed his company in excess of five-thousand dollars (569, 571, 573).

POINT I

THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY REASON OF THE PROSECUTOR'S IMPROPER ARGUMENT AND CONDUCT.

This Court is undoubtedly familiar with the decision of *Berger v. United States*, 295 U.S. 78 (1935), and especially with the following often cited portion of the opinion:

> "The United States Attorney is the representative not of an ordinary party, but of a sovereignty . . . whose interest . . . is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so, but, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Id.* at p. 88)

Because the prosecutor in this case engaged in misconduct of a substantial nature that prejudiced the defendant and that interfered with his right to a fair trial, the conviction must be reversed.

Firstly, in his summation the prosecutor told the jury, over objection, that the defendant broke windows at the Bagel Stop, (637), despite the absence of any evidence to substantiate that assertion. Testimony concerning the breaking of windows by unknown persons had been admitted into evidence, but it was admitted solely as evidence of the states of minds of prosecution witnesses. The Court specifically ruled that the evidence allowed no inference that the defendant was responsible (449-50), and

the prosecutor violated his duty of fairness when he argued that it did.

Similarly, the prosecutor improperly told the jury that the defendant "punched holes in Darryl's car" (637). Once again, Darryl Steinberg was permitted, over objection, to tell the jury that he "was continually getting flat tires" in his car; that he would park in front of his house at night and would find tires flat in the morning; that upon inspection he could see a puncture hole in the tires; that he "figured" that the tires had been punctured with an ice-pick; and that his car received approximately 14 or 15 flat tires in that manner from July to mid-August (449-50). That evidence too, however, was admitted solely to show state of mind and was not to be used as evidence of any act of the defendant (450). In fact, it should not have been admitted even for that purpose since the state of mind of Steinberg was irrelevant after July 17, the date that appellant was arrested. The prosecutor's argument that the appellant was responsible for the punctured tires was wholly unjustifiable. Moreover, the prejudicial value of those improper arguments were apparently so appealing to the prosecutor that he repeated them later on in his summation (656-7, 659).

Other improprieties committed by the prosecutor during the course of summation which improperly prejudiced and belittled the defense and created sympathy for the prosecution witnesses included stating of facts that did not appear in the testimony [("In fact . . . Standard Milling is still doing business with Phil Reicher" (634, 636); "The Bagel Stop delivery van had number 21 printed on its side. They had hoped to maybe have 21 trucks like this some day . . ." (657), *United States v. Persico*, 305 F.2d 534, 536 (2nd Cir. 1962)]; improper argument concerning the failure of the defense to call a witness, Martin Schwartzberg,

(650) who could have been expected to be more favorable to the prosecution—or at least be equally available to both sides (*United States v. La Rocca*, 224 F.2d 859, 861 (2nd Cir. 1965)*; improper appeals to emotion; and asking the jury to draw inferences of threats (654) from lawful and unthreatening conversations between the defendant and Steven Sterman (393-7) (*Hall v. United States*, 419 F.2d 582 (5th Cir. 1968). Arguments such as those, which have no basis in the evidence are among the "foulest" blows contemplated and prohibited by the *Berger* decision. *United States v. Spangelet*, 258 F.2d 338, 342-3 (2nd Cir. 1958).

The prosecutor did not save all of his improper conduct for summation. Many of his questions contained improper innuendos or assertions of fact which he could not have properly brought to the jury's attention and which had no basis in the evidence. The most prejudicial of these, which by itself would warrant reversal of the judgment, was that the defendant had previously spent a year in jail, *United States v. Broadway*, 477 F.2d 991 (5 Cir. 1973). Others included hints that the Bagel Stop had suffered from robberies because of failure to make "insurance drops", and that the same attorney improperly represented the defendant and a prosecution witness at the same time (506).

What was even more improper in the method used by the prosecutor to produce a conviction in this case was even more subtle and effective. It was the excessive amount of testimony adduced which was allegedly presented to show the states of

*Martin Schwartzberg was Steve Saperstein's business partner. Prosecution witnesses testified that it was Saperstein who talked of Appellant's bad reputation, and it was to Saperstein's firm that Reicher gave his wholesale bialy business (201, 301).

minds of those connected with the 21-44 food corporation but which was actually and deliberately used by the prosecutor to convince the jury that the defendant commenced a reign of terror on Reicher and his friends. Examples are the emphasis on and excessiveness of the testimony concerning the vandalism; the improper argument that appellant was responsible for the broken windows and tires (215, 224, 225-7, 460); the excessive amount of reputation testimony (214, 215, 223, 227); the large amount of testimony of conversations among the owners of the Bagel Stop that they were "afraid for their lives" and that they lived in constant fear (63, 237, 415, 416, 417, 450, 452, 464, 466); and the innuendo and improper statements in many of the prosecutor's questions (152, 237, 294-5, 453, 457, 466, 506, 510, 533-4) which all combined to cause undue prejudice—greatly exceeding any legitimate probative value that such evidence may have had. The probative value of the evidence was so weak as compared with the prejudice aroused, that the jury's attention was diverted from the real issues of the case. For that reason the cautionary instructions which accompanied some of the testimony could not have been sufficient to cure the errors, and the judgment should be reversed. *Bruton v. United States*, 391 U.S. 123, 136 (1968); *United States v. Sansone*, 206 F.2d 86, 88 (2nd Cir. 1953); *Powell v. United States*, 347 F.2d 156, 158 (9th Cir. 1965); *United States v. Knohl*, 379 F.2d 427, 438-9 (2nd Cir. 1967); *Wigmore on Evidence*, Sections 1904, 1907 (3rd Ed. 1954).

In short, the case involved a serious charge, and posed difficult questions of fact that were strongly contested, and upon which the evidence was close. It does not appear that the trial court was convinced of appellant's guilt. See minutes of sentencing, 1/18/74, pages S4, S12-13.

The excessive amount of reputation and state of mind testimony, the impropriety in apprising the jury by a statement in a question that the defendant had spent a year in jail, the improper argument and conduct of the prosecutor all had a cumulative effect of creating an atmosphere of prejudice which deprived the defendant of a fair trial.

When all of the circumstances of the case are thus examined, it is clear that it cannot with reasonable certainty be shown that the harm was undone, and therefore, the conviction should be set aside. *United States v. Sansone*, 206 F.2d 86, 88 (2nd Cir. 1953); *King v. United States*, 372 F.2d 383, 395, (D.C. Cir. 1967).

POINT II

THE EVIDENCE DID NOT PROVE VIOLATION OF THE HOBBS ACT. MOREOVER, THE CRIMINAL ACTIVITY INVOLVED IN THIS CASE WAS NOT WITHIN THE CONTEMPLATION OF THE CRIME CHARGED, 18 U.S.C. §19511.

Appellant was indicted and convicted for violating the Hobbs Act, 18 U.S.C. §1951, which provides, in part:

> "(a) Whoever in any way or degree obstructs . . . commerce . . . [by] extortion . . . or attempts . . . so to do, or commits or threatens physical violence . . . in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . .

* * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or under color of official right."

To be properly convicted of violating the Hobbs Act, therefore, it is required that an accused induce his victim to part with property, that he do so by threatening and instilling fear, and that as a result, interstate commerce is affected. *United States v. Addonizio*, 451 F.2d 49 (3rd Cir. 1971). "Threats" within the meaning of the Hobbs Act is defined as an expression of an intention to inflict harm upon another. *Herbert Burman v. Local 3, Intn'l Brthd of Elec. Workers*, 214 F.Supp. 353 (D.C.N.Y. 1969). The evidence failed to prove appellant's guilt because it did not show that he had any intent to deprive the 21-44 Food Corporation of any property, or that he made any threats or committed any violent act in furtherance of a plan or purpose to do so.

The Government's theory at the trial in the instant case was that the defendant tried to re-obtain five Waldbaum's Supermarket accounts which had previously been serviced by him but which were given to the 21-44 Food Corporation, and that after the transfer the defendant forced the 21-44 Food Corporation out of business. *Indictment;* Government's Opening Statement, page 63; Government's Summation, pages 645-6, 655. The contention was based primarily on the evidence that the defendant, Schwartzberg, set fire to the delivery van which was owned by the 21-44 Food Corporation. To buttress that assertion, the prosecutor also argued that testimony concerning acts of anonymous vandalism, which was admitted

solely to show the states of minds of prosecution witnesses, could be used by the triers of fact to infer an extortionous intent on the part of the defendant. He also claimed that testimony of conversations between the defendant and Philip Reicher [a principal of 21-44 Food Corporation] and between the defendant and Stephan Sterman [21-44's delivery van driver] support a finding that the appellant threatened prosecution witnesses. His arguments are inappropriate and wrong.

Although the evidence supported the finding that the defendant attempted to set fire to the truck it does not, even when viewed in a light most favorable to the Government, support the verdict that he violated the Hobbs Act, 18 U.S.C. §1951, because the commission of a single violent act such as the attempt to burn the truck does not automatically amount to extortion within the meaning of the Hobbs Act. *United States v. Enmons*, 335 F.Supp. 641 (D.C.La. 1971), *aff'd* 410 U.S. 396 (1971). And since there was no showing that the defendant committed any other act of vandalism, the evidence concerning broken glass and slashed tires could not properly be used against him as evidence of extortionous conduct or intent. *United States v. Glasser*, 443 F.2d 994, 1008-09 (2nd Cir. 1971).

Nor did the defendant's conversations alluded to by the prosecution show any expression of an intention to inflict harm. They showed only that appellant lawfully attempted to convince Stephan Sterman to join a union, and that he realized that Reicher's business was in serious trouble. Neither of those conversations involved any threats, nor did they amount to unlawful activity [*See United States v. Varlack*, 225 F.2d 665 (2nd Cir. 1955) which held that peaceful activity and economic persuasion to achieve legitimate labor objections is not proscribed by the Hobbs Act, and *Herbert Burman v. Local 3*,

Intn'l Brthd of Elec. Workers, supra, defining "threats" as an expression of an intention to inflict harm].

At worst, the evidence established that the defendant was guilty of crime, local in nature and properly within the jurisdiction of the State; that is, the offense of Criminal Mischief. That is the offense for which he was arrested and it was the crime for which he should have been tried. The instant conviction for the more serious federal crime cannot stand because the proof was insufficient.

Additionally, the Federal Government overreached when it asserted jurisdiction in this case which was essentially local in nature. The Hobbs Act which was conceived to deter labor racketeering and professional gangsterism [See *United States v. Howe,* 353 F.Supp. 419, 424 (D.C.Mo. 1973) citing *S.Rep.* No. 1440 73d Congress, 2d Session] was charged in this case only because of the tenuous happenstance that flour used in the manufacture of bagels was shipped from New Jersey to New York. There was no claim, nor is there even any hint in the record, that the defendant was ever involved in organized crime, racketeering or gangsterism—areas which are concededly national in their scope and legitimately within the purview of the anti-racketeering laws. This case attempts to expand the application of the Federal Anti-racketeering laws to relatively minor criminal activity which traditionally has been subject to state regulation. *See, Rewis v. United States,* 401 U.S. 808, 812 (1971); *United States v. Archer,* 486 F.2d 670, 678 (2nd Cir. 1973). Congress's intent in passing the anti-racketeering laws was not so broad as to encompass a case like the instant one, because to do so would render nearly every petty act of vengeance a federal felony.

Furthermore, it should be noted that this case is different from others where, after convictions, arguments that the Hobbs Act did not apply were made and rejected by appellate courts [See, for example, *United States v. De Masi*, 445 F.2d 251 (2nd Cir. 1971); *United States v. Augello*, 451 F.2d 1167 (2nd Cir. 1971); *United States v. Tropiano*, 418 F.2d 1069 (2nd Cir. 1969)]. All of those cases concerned factual situations involving serious overt threats, at least a suggestion of involvement of organized racketeering, serious intervention with interstate commerce, or serious crime. Those factors, which are not present in this case, convinced the Courts that prosecution under the Hobbs Act was appropriate. They are not present here.

Because of the failure of proof and the inapplicability of the crime charged, therefore, the conviction should be reversed.

CONCLUSION

THE JUDGMENT CONVICTING THE APPELLANT SHOULD BE REVERSED AND THE INDICTMENT SHOULD BE DISMISSED; OR, IN THE ALTERNATIVE A NEW TRIAL SHOULD BE ORDERED.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the day of , 19 at No. deponent served the within upon the herein, by delivering a true copy thereof to personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me,
this day of 19

.....
Edward Bailey

.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973